KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D. C. 20036
(202) 955-9600

NEW YORK, N.Y.
LOS ANGELES, CA.
MIAMI, FL.
CHICAGO, IL.
STAMFORD, CT.
PARSIPPANY, N.J.

BRUSSELS, BELGIUM
HONG KONG

AFFILIATED OFFICES
NEW DELHI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792

ORIGINAL

July 10, 1997

ROBERT J. AAMOTH
DIRECT LINE (202) 955-9676
E-MAIL: raamoth@kelleydrye.com

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222 Mail Stop 1170
Washington, D.C. 20554

Re: Ex Parte Presentation
International Settlement Rates
IB Docket No. 96-261

Dear Mr. Caton:

On behalf of Kokusai Denshin Denwa Co. Ltd. ("KDD") and pursuant to Section 1.1206 of the Commission's Rules, enclosed for filing are two copies of KDD's Comments on the Commission's Notice in *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142. Please include these Comments in the record for the proceeding captioned above.

Respectfully submitted,

Robert J. Aamoth

cc: Hon. Reed E. Hundt
Hon. James H. Quello
Hon. Susan Ness
Hon. Rachelle B. Chong
Mr. Peter F. Cowhey
Diane J. Cornell, Esq.
Kathryn O'Brien, Esq.
ITS

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D. C. 20036
(202) 955-9600

NEW YORK, N.Y.
LOS ANGELES, CA.
MIAMI, FL.
CHICAGO, IL.
STAMFORD, CT.
PARSIPPANY, N.J.

BRUSSELS, BELGIUM
HONG KONG

AFFILIATED OFFICES
NEW DELHI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792

ORIGINAL

RECEIVED

JUL 10 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

ROBERT J. AAMOTH
DIRECT LINE (202) 955-9676
E-MAIL: raamoth@kelleydrye.com

July 10, 1997

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222 Mail Stop 1170
Washington, D.C. 20554

Re: Ex Parte Presentation
International Settlement Rates
IB Docket No. 96-261

Dear Mr. Caton:

On behalf of Kokusai Denshin Denwa Co. Ltd. ("KDD") and pursuant to Section 1.1206 of the Commission's Rules, enclosed for filing are two copies of KDD's Comments on the Commission's Notice in *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142. Please include these Comments in the record for the proceeding captioned above.

Respectfully submitted,

Robert J. Aamoth

cc: Hon. Reed E. Hundt
Hon. James H. Quello
Hon. Susan Ness
Hon. Rachelle B. Chong
Mr. Peter F. Cowhey
Diane J. Cornell, Esq.
Kathryn O'Brien, Esq.
ITS

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter	)	
	)	
Rules and Policies on Foreign	)	IB Docket No. 97-142
Participation in the U.S.	)	
Telecommunications Market	)	

COMMENTS OF KOKUSAI DENSHIN DENWA CO. LTD.

Robert J. Aamoth
Joan M. Griffin
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

July 9, 1997

SUMMARY

Kokusai Denshin Denwa Co. Ltd. ("KDD") submits these comments on the FCC's proposals to modify its rules to implement the WTO Agreement. Japan plans to open its markets to carriers from the U.S. and other countries without any restrictions on entry by foreign carriers or dominant carrier safeguards based upon foreign market power. KDD urges the FCC to share Japan's vision of open markets and competitive entry in global markets under the WTO Agreement, and to finally move away from a regulatory regime characterized by entry tests and multiple safeguards that will impede competitive entry into the U.S. market by foreign carriers.

KDD supports the FCC's proposal to eliminate the effective competitive opportunities (ECO") test not merely because the test will be unnecessary in the post-WTO environment, but because the ECO test is fundamentally inconsistent with the Most Favoured Nation and other GATS principles which require the U.S. to open its markets to foreign carriers on a non-discriminatory basis.

The FCC's proposal to conduct a public interest analysis in processing applications by foreign carriers also is contrary to the WTO Agreement and the GATS. The FCC cannot selectively bar entry into the U.S. market by foreign carriers based upon foreign market power, or the trade and other political factors identified by the FCC, consistent with the GATS requirements that entry regulations be transparent (Article III), and reasonable, objective, and impartial (Article VI).

The FCC's proposal to consider U.S. trade policy in processing applications by foreign carriers is particularly troubling. The International Bureau has delayed indefinitely the processing of Section 214 applications filed by KDD's U.S. subsidiary on the basis of "trade policy

concerns" that the U.S. government either cannot or will not clarify for the record. The FCC should remedy such an arbitrary and non-transparent process by granting those applications expeditiously.

KDD submits that safeguards proposed by the FCC are contrary to fundamental GATS principles and do not constitute "appropriate" measures as allowed by the WTO Reference Paper. KDD particularly objects to the FCC's proposal to condition Section 214 authorizations granted to foreign carriers or their affiliates on compliance with the FCC's settlement rate benchmark policies. Such a condition would be an inappropriate pre-entry restriction on foreign carrier entry under the GATS. Further, The FCC's proposal to apply benchmarks to foreign countries but not the United States by retaining the policy on the 50/50 division of tolls would not constitute full compliance with the National Treatment obligation in GATS Article XVII.

As regards the FCC's proposal to require foreign carriers to reduce their settlement rates to the low end of the benchmark range if they are found to have caused a "distortion" in the U.S. market, that policy does not comply with the GATS principles of Most Favoured Nation (Article II) and National Treatment (Article XVII), nor does it qualify as an "appropriate" regulatory measure pursuant to the WTO Reference Paper.

Finally, as regards the FCC's proposed imposition of dominant carrier safeguards upon foreign carriers with foreign market power, the FCC should clarify that a foreign carrier will not be found to possess foreign market power where it does not control bottleneck local exchange facilities in the foreign country and the foreign country has licensed multiple facilities-based international carriers.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142

To: The Commission

COMMENTS OF
KOKUSAI DENSHIN DENWA CO. LTD

I. INTRODUCTION

Kokusai Denshin Denwa Co. Ltd. ("KDD"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking (FCC 97-195) released by the FCC on June 4, 1997 in the proceeding captioned above ("Notice"). In this proceeding, the FCC has proposed changes to its rules regarding foreign carrier entry into the U.S. international telecommunications market in response to the recent adoption of the World Trade Organization Basic Telecom Agreement ("WTO Agreement"). KDD is one of seven Type I facilities-based international carriers in Japan, and its wholly-owned U.S. affiliate, KDD America, Inc. ("KDD America"), has obtained limited Section 214 authority under the FCC's current foreign entry policies. As a result, KDD is well-positioned to offer informed commentary on the FCC's proposals.

KDD urges the FCC, in reviewing its proposals and the submissions in this proceeding, to keep in mind that Japan and other countries plan to implement the WTO Agreement fully and without any unauthorized reservations or modifications. Japan plans to open its domestic and international telecommunications markets to carriers from the United States and other countries, without any restrictions on entry by foreign carriers or any

dominant carrier safeguards based upon foreign market power. In contrast to the FCC's proposals in this proceeding, the Ministry of Posts and Telecommunications ("MPT") in Japan will approve applications by U.S. and other foreign carriers to enter the Japanese telecommunications market as Type II carriers within 15 days after they are filed,[1] and MPT will approve applications by U.S. and other foreign carriers to enter the Japanese market as Type I carriers normally within two months. This approach complies fully with the WTO Agreement, and KDD submits that a policy of open entry will promote competition and the public interest in member countries. KDD urges the FCC to share Japan's vision of open markets and competitive entry in global telecommunications markets under the WTO Agreement, and to finally move away from a regulatory regime characterized by entry tests and multiple safeguards that will impede foreign carrier entry into the U.S. international telecommunications market.

II. THE ECO TEST IS NOT CONSISTENT WITH THE WTO AGREEMENT AND THE GATS FRAMEWORK, AND THE PROPOSED PUBLIC INTEREST TEST FAILS TO COMPLY WITH TRANSPARENCY AND OTHER GATS PRINCIPLES

In the Notice (at ¶¶ 10 & 29), the FCC proposes to eliminate the effective competitive opportunities ("ECO") test, and to permit more open entry into the U.S. market for foreign carriers from WTO member countries. The FCC bases this proposal on changes in the global competitive environment that will result from implementation of the WTO Agreement. According to the FCC, fulfillment of the commitments made by the United States and other member countries will open foreign markets to competition and greatly reduce the ability of

[1] The procedures for such applications are clarified in "The Procedures for operating International VAN business" (revised edition April 1, 1995), which was based upon the U.S.-Japan international value-added service arrangements.

carriers to engage in anticompetitive behavior.[2] As such, the FCC believes that the ECO test is no longer necessary and that carriers from WTO Member countries should have more flexibility to enter the U.S. market. The introduction of new sources of competition will produce lower prices and greater service choice and innovation for consumers, and thus will advance the FCC's goal of effective competition.[3]

KDD agrees with the FCC's assessment that implementing the WTO Agreement will promote the FCC's long-stated goals of achieving reciprocal entry opportunities and fostering competition in the international services market. However, in basing its decision to abolish the ECO test on the lack of necessity for such a test in the post-WTO environment, the FCC failed to analyze fundamental principles of the WTO Agreement and the General Agreement on Trade in Services ("GATS"). In subscribing to the WTO Agreement, the United States committed to open its markets to foreign carriers on a non-discriminatory basis in accordance with GATS Article II (Most Favoured Nation) and GATS Article XVI (Market Access). As an undisguised entry restriction that discriminates among foreign carriers based upon their country of origin, the ECO test is fundamentally inconsistent with the Most Favoured Nation and Market Access principles, and thus the FCC must abolish the ECO test as a legal matter.

While proposing to abolish the ECO test, the FCC at the same time would continue to conduct a public interest analysis in considering Section 214, Section 310(b)(4), or cable landing license applications submitted by foreign carriers or their affiliates. For example, with respect to Section 214 applications, the FCC states that its public interest analysis will consider, among other things, whether a foreign carrier's entry into the U.S. market would

---

2 Notice at ¶29.

3 Notice at ¶5.

create a "very high risk" to competition.[4] Further, the FCC states that it will deny applications based upon considerations brought to its attention by other U.S. Government bodies, including national security, law enforcement, foreign policy, or "trade concerns," in determining whether to grant an application.[5] Such public interest tests are precisely the type of foreign carrier entry restrictions that the WTO Agreement prohibits.

The FCC's proposed public interest tests raise serious concerns about transparency. GATS Article III requires each member to publish or make publicly available all of its "measures of general application" that affect trade in services, including all the laws, rules, regulations, and other conditions affecting entry into a market. The proposed public interest tests are subjective, vague and undefined, and thus give the FCC the ability to act in an arbitrary manner that would disadvantage foreign providers of telecommunications services. As such, the FCC's proposal to employ a public interest analysis in considering entry applications filed by foreign carriers or their affiliates would place the United States in violation of its transparency obligations under the GATS. For similar reasons, KDD submits that the FCC's proposed public interest tests are not the "reasonable, objective and impartial" domestic regulations required by GATS Article VI.

Moreover, the FCC's proposed public interest tests go well beyond the limited scope of GATS Article XIV, which establishes certain General Exceptions permitting countries to adopt nondiscriminatory measures to promote public morals, public order, public safety, and similar considerations. To the extent the FCC proposes to utilize a different "public interest" test, or no such test at all, for U.S.-owned carriers, KDD submits that the proposed "public

---

[4] Notice at ¶ 32.

[5] Notice at ¶¶ 39-43.

interest" tests for foreign carriers would be inconsistent with the National Treatment principle in GATS Article XVII.

In addition, the FCC's proposal to consider "trade concerns" in processing entry applications by foreign carriers[6] is of particular concern to KDD because of KDD's past and ongoing inability to obtain timely Section 214 authority from the FCC. The FCC waited more than one year to grant KDD America's application for Section 214 authority to provide non-interconnected international private line services on the U.S.-Japan route,[7] and when the FCC finally issued a decision on that application it classified KDD America as a dominant carrier even though the FCC found that has no market power in the international private line resale market or in the domestic connecting private line market in Japan.[8] Ironically, the FCC stated in the Notice (at ¶ 31) that it regards resale operations by U.S. carriers with foreign affiliations to pose no concerns regarding anticompetitive conduct. That statement serves only to underscore the arbitrariness of the International Bureau's decision to impede KDD America's entry into the U.S. market by classifying it as a dominant U.S. resale carrier. The FCC has not taken any action since KDD America filed a petition for limited reconsideration with the FCC on October 17, 1996. The FCC should respond to that petition promptly without any further unreasonable delays.

---

[6] Notice at ¶ 43.

[7] As noted above, MPT in Japan will process applications for Type II authority within 15 days and applications for Type I authority normally within two months. KDD is aware of no complaint by a foreign carrier that MPT has been dilatory in processing an application.

[8] See KDD America, Inc., ITC-95-481, 11 FCC Rcd 11329 (1996). Despite its conclusion that KDD exercises "bottleneck control over transmission facilities that U.S. applicants need in order to provide non-interconnected IPL resale service," id. at 11351, the International Bureau recognized that KDD does not have market power in the Japanese IPL resale market or the domestic Japanese connecting private line market, id. at 11333-34.

Earlier this year, KDD America filed two applications for Section 214 authority to provide international non-interconnected private line and switched resale services to various foreign points.[9] Although KDD America's applications plainly qualified for and were initially granted streamlined processing under the FCC's rules, and even though no parties opposed those applications, the International Bureau subsequently denied streamlined processing of those applications by letter dated March 7, 1997.[10] That letter advised KDD America that the International Bureau was acting at the written instruction that same day of three Executive Branch agencies (the Department of Commerce, the Department of State, and the Office of the United States Trade Representative).[11] Those agencies provided no written explanation for their desire to delay KDD America's entry into the U.S. market other than unspecified "trade policy concerns."

The International Bureau recognized that its action removing one of the applications from streamlined processing violated the FCC's own rules limiting its discretion to remove applications from streamlined processing. The International Bureau justified its actions due to alleged "extraordinary circumstances" even though the Executive Branch agencies did not provide, and the International Bureau did not request, any details concerning the "trade policy concerns" that prompted the International Bureau's actions.[12] The International Bureau has

---

[9] These applications were given File Nos. ITC-97-047 and ITC-97-098 by the FCC. Neither application requests service to any location to which a KDD affiliate even arguably has market power.

[10] See Letter from D. Cornell, FCC, to H. Hirai, KDD America (March 7, 1997).

[11] See Letter from L. Irving, NTIA, J. Lang, USTR & V. McCann, Department of State, to R. Hundt, FCC (March 7, 1997).

[12] The letter from the Executive Branch agencies concerning KDD America's applications stated that they would provide further advice regarding the applications "upon completion of (continued...)

yet to respond formally to KDD America's request for an explanation and a status conference regarding the agency's refusal to process KDD America's applications in a timely manner in accord with the agency's rules.[13] The International Bureau has provided no guidance as to when KDD America can expect to have its pending Section 214 applications acted upon, and in the meantime KDD America is prevented from implementing fully its business plan for entering the U.S. market because it lacks the requisite authority from the FCC to provide service.

KDD respectfully submits that the FCC should grant KDD America's pending and future Section 214 applications expeditiously. It is inherently arbitrary and non-transparent for the FCC to establish what is effectively a moratorium of indefinite duration on the processing of KDD America's applications based solely upon unspecified "trade policy concerns" which the U.S. Government either cannot or will not clarify on the record. Further, while KDD believes that KDD America's applications should be granted immediately under existing legal principles, KDD submits that the clear inconsistency between the FCC's processing of these applications and the GATS framework underscores the legitimacy of KDD's position. GATS Article VI (Domestic Regulation) requires applications to be processed "within a reasonable period of time," and GATS Article XVII (National Treatment) prohibits discrimination in the processing of applications filed by foreign and U.S.-owned carriers.

---

[12](...continued)
[their] review." The Executive Branch agencies have not specified any date by which they will complete their review.

[13] See Letter from H. Hirai, KDD America, to P. Cowhey, FCC (March 17, 1997).

III. THE FCC MAY NOT ADOPT SETTLEMENT RATE BENCHMARK POLICIES AS DOMINANT CARRIER SAFEGUARDS UNDER THE WTO AGREEMENT

In the Notice (at ¶ 84), the FCC asserts that the changes brought to the competitive environment as a result of the WTO Agreement may not entirely eliminate the possibility that carriers with market power will engage in anticompetitive behavior. Accordingly, the FCC proposes to implement various measures to aid in the detection and prevention of anticompetitive conduct. The United States' Schedule of Specific Commitments adopts the WTO Reference Paper as an Additional Commitment, and that Reference paper provides that "appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices." However, the FCC cannot adopt safeguards that conflict with fundamental GATS principles, including Article II (Most Favoured Nation); Article VI (Domestic Regulation); Article XVI (Market Access); and Article XVII (National Treatment). Moreover, KDD would note that the WTO Reference Paper does not constitute an implicit limitation on the United States' GATS commitments, and it authorizes only "appropriate" measures to address a perceived need for safeguards against anti-competitive conduct. KDD submits that several aspects of the FCC's proposals in this proceeding violate GATS principles and do not constitute "appropriate" measures pursuant to the WTO Reference Paper.[14]

---

[14] GATS Article VIII requires Members who grant or condone monopolies or exclusive rights to ensure that each service supplier holding such rights "does not, in the supply of the monopoly [or exclusive] service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II [the MFN principle] and specific commitments." GATS Article IX obligates Members, when confronted by another Member with practices (other than practices by monopolistic or exclusive providers) that restrain competition in ways which restrict trade in services, to enter into consultations with a view to eliminating such anticompetitive business practices and to supply pertinent information consistent with its laws and non-disclosure agreements.

A. The FCC Cannot Adopt Its Proposed Settlement Rate Policies As Foreign Carrier Safeguards

In the Notice (at ¶¶ 119-121), the FCC reiterates the proposal, originally set forth in the *Benchmarks Notice*,[15] to condition a foreign carrier's entry into the U.S. facilities-based international telecommunications market upon compliance with the FCC's settlement rate benchmark policies. The FCC also reiterates the proposal that if a foreign carrier permitted to enter the U.S. facilities-based international market causes a "distortion" of competition on the route in question, the FCC would require the foreign carrier to reduce its settlement rates on the route to the bottom of the benchmark range (i.e., $.09/minute).

KDD has demonstrated previously in its comments and reply comments in IB Docket No. 96-261 that the FCC's proposed settlement rate policies are unwise and unlawful.[16] KDD will not reiterate those arguments here, except to emphasize its previous showing that (i) the FCC lacks the necessary sovereign and statutory jurisdiction; (ii) the FCC's proposals are contrary to binding international regulations; (iii) the FCC has misapprehended the nature, causes and consequences of the settlements imbalance; (iv) there is no empirical support for the FCC's proposals in the record; and (v) the proposals would violate the Most Favoured Nation and National Treatment obligations under the WTO Agreement. The FCC's settlement rate benchmark proposals are no less unlawful in this proceeding than in the context of IB Docket No. 96-261.

---

[15] International Settlement Rates, IB Docket No. 96-261, *Notice of Proposed Rulemaking*, FCC 96-484 (Dec. 19, 1996).

[16] See Comments of Kokusai Denshin Denwa Co. Ltd., IB Docket No. 96-261, filed Feb. 7, 1997; Reply Comments of Kokusai Denshin Denwa Co. Ltd., IB Docket No. 96-261, filed March 31, 1997; Letter from R. Aamoth, Counsel for KDD, to W. Caton, FCC (June 5, 1997) (ex parte submission on the record in IB Docket No. 96-261).

In these comments, KDD would like to underscore that the FCC's proposal to require compliance with the FCC's benchmark policies as an express condition of an international facilities-based Section 214 authorization is an inappropriate pre-entry restriction upon foreign carriers. Without providing any analysis or discussion, the Notice (at ¶¶ 8, 13, 39, 51) repeatedly characterizes the FCC's proposals as "post-entry" regulations. In fact, the FCC's proposal to require compliance with the settlement rate benchmarks as a condition of entry into the U.S. market constitute a classic pre-entry restriction. Further, because the FCC's benchmark policies are directed solely at foreign countries, not the United States, it would violate the National Treatment principle in GATS Article XVII to establish such policies as a pre-entry restriction for foreign carriers.

In addition, the FCC's proposed conditions would discriminate among foreign carriers in violation of the Most Favoured Nation principle in GATS Article II, which requires the FCC to treat carriers from one country no less favorably than carriers from any other country. Through these proposals, the FCC has stated its intention to discriminate among foreign carriers in terms of entry into the U.S. market based upon their settlement rates with U.S. carriers. The FCC cannot use entry into the U.S. market as a mechanism to force foreign carriers to lower their settlement rates to levels that the FCC deems acceptable. The MFN principle works together with the Market Access commitment to ensure that all foreign-owned carriers are entitled to enter the U.S. international telecommunications market, just as all U.S.-owned carriers are entitled to enter the markets in other countries who signed the WTO Agreement.

Moreover, the FCC's proposed "distortion" policy -- namely, its proposal to require foreign carriers who enter the U.S. market to reduce their settlement rates to the low end of the benchmark range if they are found to have caused a market "distortion" -- conflicts with

the GATS framework. In particular, that policy would violate the National Treatment principle in GATS Article XVII because it would apply only to selected foreign carriers, but not to U.S. carriers. In addition, given the vague and subjective standards for determining when a distortion has occurred and which carrier is responsible for causing it, the FCC's distortion policy does not constitute a "reasonable, objective and impartial" regulation under GATS Article VI. Under the GATS framework, the FCC must promote U.S. public policy through reasonable and non-discriminatory post-entry regulations, such as reporting, record-keeping and other requirements imposed upon all U.S. international carriers.

Further, KDD wishes to again lodge its objection to the FCC's apparent plan to impose settlement rate benchmarks upon every country except the United States. As KDD noted in its comments in IB Docket No. 96-261, the FCC's apparent intention to continue enforcing a policy requiring a 50/50 division of tolls would result in non-cost oriented settlement rates charged by U.S. carriers to terminate foreign-billed traffic.[17] It is a patent violation of the National Treatment principle in GATS Article XVII for the FCC to require all foreign carriers, but no U.S. carriers, to adopt what the FCC deems to be cost-oriented settlement rate benchmarks.

Finally, KDD believes that the FCC's decision to issue apparently identical settlement rate proposals in two different rulemaking proceedings is confusing. Therefore, KDD requests that the FCC remove the settlement rate proposals from the instant proceeding, thereby confining them to IB Docket No. 96-261. At a minimum, the FCC should clarify that it will consider the record on those proposals to consist of the relevant submissions in both this

---

[17] See Comments of Kokusai Denshin Denwa Co. Ltd., IB Docket No. 96-261, filed Feb. 7, 1997, at 16.

proceeding and IB Docket No. 96-261. KDD requests that its submissions in one proceeding be treated by the FCC as submissions in both proceedings.

B. The FCC's Settlement Rate Benchmark Policies Do Not Constitute An "Appropriate Measure" Within The Meaning Of The WTO Reference Paper

The Notice (at ¶¶ 9, 79) relies upon the WTO Reference Paper, to which the United States subscribed as an Additional Commitment in its Schedule of Specific Commitments, to justify its proposed foreign carrier safeguards. However, the WTO Reference Paper only authorizes the FCC to adopt "appropriate measures" to address the perceived risk of anti-competitive conduct. KDD submits that pre-entry restrictions, such as the FCC's proposed policy requiring foreign carriers to comply with the FCC's settlement rate benchmarks as a condition of entry, are inherently inappropriate measures within the meaning of the WTO Reference paper. Similarly, the FCC's proposed policy to require foreign carriers who cause a "distortion" in the U.S. market to reduce their settlement rates to $.09/minute is much too vague and subjective to qualify as an "appropriate" regulatory measure within the meaning of the WTO Reference Paper. In general, only measures which are fully consistent with the GATS framework should be regarded as "appropriate" regulatory measures to address the risk of anticompetitive conduct.

Further, KDD has previously demonstrated in its comments and reply comments in IB Docket No. 96-261 that the FCC's proposed settlement rate conditions and policies violate established international regulations, and exceed the sovereign and statutory jurisdiction of the United States. As such, those conditions and policies cannot qualify as "appropriate" regulatory measures under the WTO Reference Paper.

C. Foreign Carriers Who Face Multiple Facilities-Based International Competitors And Who Do Not Control Bottleneck Local Exchange Facilities In The Foreign Country Should Be Found Not To Possess Foreign Market Power.

In the Notice (at ¶¶ 78-122), the FCC proposes to revise its scheme for regulating foreign-affiliated carriers. Such carriers would be subject to different levels of dominant carrier safeguards depending upon the market power of the foreign affiliate and the level of licensed entry in the facilities-based international market in the foreign country. In particular, where the foreign carrier lacks market power, the FCC proposes not to impose foreign carrier safeguards. Where the foreign carrier has market power but faces multiple facilities-based international competitors, the FCC proposes to impose basic safeguards. Where the foreign carrier has market power and does not face multiple facilities-based international competitors, the FCC proposes to impose both basic and supplemental safeguards.

KDD recommends that the FCC should clarify that the only foreign carriers regarded as having foreign market power are those that control true bottleneck local exchange facilities in the foreign country. Where a foreign carrier does not control bottleneck local exchange facilities in the foreign country, and where the foreign country has licensed multiple facilities-based international carriers, the FCC should find that such foreign carrier lacks market power. Under that approach, the FCC should conclude that KDD does not possess market power in any market segment in Japan and, therefore, that KDD America should be classified as a nondominant U.S. carrier for both resale and facilities-based services on the U.S.-Japan route.[18]

---

[18] KDD America filed a still-pending petition for reconsideration of the FCC's decision to classify it as a dominant U.S. resale carrier on the U.S.-Japan route pursuant to KDD America, Inc., ITC-95-481, 11 FCC Rcd 11329 (1996).

This approach is reasonable in light of the FCC's goal to prevent foreign carriers from increasing the costs of unaffiliated U.S. carriers. It is virtually impossible for a foreign carrier to maintain bottleneck international gateway facilities in a market environment characterized by multiple facilities-based international licensees. For many new entrants, the capital and other resources necessary to establish their own international gateway capabilities are readily available. Many global carriers already own end-to-end transmission capacity, and the installation of a switch with associated backhaul and transport facilities is readily achievable within a reasonable time frame. As a result, once multiple facilities-based international licenses are granted, for all practical purposes there can be no "bottleneck" international facilities.

By contrast, it may be much more expensive, time-consuming and difficult for new entrants to establish domestic termination and local exchange facilities in a foreign country. Even after a foreign country grants multiple facilities-based domestic or local licenses, it may be months or even years before the incumbent carrier qualifies as a non-dominant carrier in that country. Unlike the international gateway "bottleneck," which is almost immediately eroded by the grant of multiple facilities-based international licenses, the domestic or local exchange "bottleneck" does not erode as quickly.

Conclusion

For the foregoing reasons, KDD submits that the FCC should modify its proposals in this proceeding as specified herein.

Respectfully submitted,

KOKUSAI DENSHIN DENWA CO. LTD.

By: _____

Robert J. Aamoth
Joan M. Griffin
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

July 9, 1997

Its Attorneys

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that I have served a copy of the foregoing "Comments of Kokusai Denshin Denwa Co. Ltd." on this 9th day of July, 1997, upon the following parties by hand:

The Honorable Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

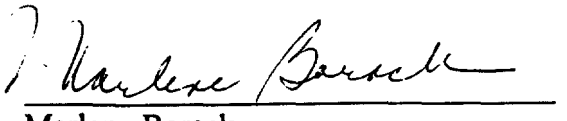
Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Peter Cowhey, Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Diane Cornell, Chief
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Douglas Klein
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

International Transcription Service
1919 M Street, N.W.
Room 246
Washington, D.C. 20554



Marlene Borack